

FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZQJO v MINISTER FOR IMMIGRATION & ANOR [2011] FMCA 526

MIGRATION – Application to review decision of Migration Review Tribunal in relation to Partner visa – whether notice of invitation to Tribunal hearing given in accordance with the requirements of the *Migration Act 1958* (Cth) – relevance of new relationship where applicant had ‘lost contact’ with nominator.

Migration Act 1958 (Cth), ss.359, 360, 360A, 362B, 379, 379A, 379C
Migration Regulations 1994 (Cth), reg.1.15A, 4.21

Applicant VEAN of 2002 v The Minister for Immigration and Multicultural and Indigenous Affairs (2003) 133 FCR 570; [2003] FCAFC 311
SZOBI v Minister for Immigration and Citizenship (No.2) (2010) 119 ALD 233; [2010] FCAFC 151

Applicant:	SZQJO
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	SYG 67 of 2011
Judgment of:	Barnes FM
Hearing date:	22 June 2011
Delivered at:	Sydney
Delivered on:	22 June 2011

REPRESENTATION

Applicant: In person

Solicitors for the Respondents: Sparke Helmore

ORDERS

- (1) The pseudonym SZQJO be allocated to this matter.
- (2) The application is dismissed.
- (3) The applicant pay the costs of the first respondent fixed in the sum of \$3,500.

FEDERAL MAGISTRATES

COURT OF AUSTRALIA

AT SYDNEY

SYG 67 of 2011

SZQJO

Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP

First Respondent

MIGRATION REVIEW TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. This is an application for review of a decision of the Migration Review Tribunal dated 14 December 2010. The Tribunal affirmed a decision of a delegate of the first respondent not to grant the applicant a Partner (Temporary) (Class UK) visa, nor a Partner (Residence) (Class BS) visa.
2. The applicant, who is said to have arrived in Australia in 2001, applied for a Partner (Temporary) (Class UK) visa by application received on 20 March 2002. In that application he provided details of the person who was nominating him for the visa. As I was informed today that the applicant in these proceedings is a former protection visa applicant, I will not use his name and I will not use the family name of the person who was nominated as his partner, but will simply identify her as Ms L. It appears that Ms L completed and signed Part G of the visa application form, confirming that she was nominating the applicant for the visa. By letter dated 13 May 2002, the applicant's representative

sought additional time to provide further documentation. Some additional documentation was provided. The Department sought further documentation. By email of 10 June 2003, the applicant's representative requested an additional seven days to provide such documentation, but no further correspondence was received by the Department. In a decision dated 24 July 2003, a delegate of the first respondent refused to grant the applicant a Partner visa.

3. It is relevant to explain the legislative scheme applicable in relation to applications for visas of the class in issue in these proceedings. The Partner (Temporary) (Class UK) visa is a class of visa that entitled an applicant to remain in Australia on a temporary basis in order to meet the criteria for the grant of a Partner (Residence) (Class BS) visa. The relevant subclass in issue in these proceedings was Subclass 820, the criteria for which are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth).
4. Relevantly, one of the applicable criteria was that at the time of application the visa applicant be the spouse of an Australian citizen, permanent resident, or eligible New Zealand citizen. In addition subcl.820.211(2)(b) required that at the time of the decision the applicant continued to be the spouse of the nominating spouse, unless the nominating spouse had died, the applicant had suffered domestic violence committed by that person, or in circumstances where the applicant had certain rights and/or obligations under the *Family Law Act 1975* (Cth). Regulation 1.15A of the Migration Regulations, as it stood at the relevant time, defined the term “*spouse*” for the purposes of the *Migration Act 1958* (Cth) (“the Act”). Persons in a married relationship had to be married to each other under a marriage that was valid for the purposes of the Act. The decision-maker had to be satisfied among other things that the relationship was genuine and continuing and that the couple lived together, or did not live separately and apart on a permanent basis.
5. While the delegate was satisfied that the applicant and the nominator were lawfully married, the delegate was not satisfied that they continued to be in a genuine and continuing relationship at the time of the decision. The application was refused on that basis. The applicant did not meet the criteria for any other class or subclass of visa.

6. The applicant's original application to the Tribunal in 2003 was regarded by the Tribunal as ineligible because it was out of time. This decision was affected by the decision of the Full Court of the Federal Court in *Applicant VEAN of 2002 v The Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 570; [2003] FCAFC 311. As it appeared that there had not been a valid notification by the Department, there was a re-notification of the delegate's decision to the applicant dated 21 May 2010.
7. The applicant again sought review of the delegate's decision by application lodged on 4 June 2010. In his application the applicant provided a residential address in Pymont. He did not nominate a representative, but indicated that he wanted all correspondence sent to him at his Pymont address.
8. The Tribunal wrote to the applicant by letter dated 23 August 2010, requesting information to support his claim that he and his partner were in a spouse relationship. It appears that this letter may have been intended to be a letter pursuant to s.359 of the Act, having regard to the fact that a further letter in similar terms, including the requisite information about the consequences of a failure to respond, was sent to the applicant on 5 October 2010.
9. By letter received by the Tribunal on 11 November 2010, the applicant responded. He stated relevantly that he had quarrelled with his wife, Ms L, who had been his nominator; that she left the home and said she would never return; that he had lost contact with her, except for brief initial contact on the telephone; and that he now had a new girlfriend with whom he had had a child. He hoped to find Ms L to settle his marriage problem. Attached to this letter was a copy of a newspaper clipping in Chinese and an English translation, which appears to contain a notice from the applicant attempting to contact Ms L sometime in 2010. The applicant stated in his written response that his attempt to contact Ms L had been in vain.
10. In addition, on the same day the applicant provided the Tribunal with a change of contact details form in which he advised of new contact details, being a residential address in Ultimo. He did not appoint an authorised recipient.

11. By letter dated 15 November 2010, the Tribunal wrote to the applicant at the Ultimo address provided by him on 11 November 2010, inviting him to attend a hearing on 9 December 2010.
12. The applicant did not appear at the Tribunal hearing. A copy of an envelope bearing the same registered post number as the letter in question which indicates that it was returned to sender on 8 December 2010 is included in the Court Book.
13. In its reasons for decision dated 14 December 2010 the Tribunal recorded that on 15 November 2010 it invited the applicant to appear before it by letter sent to the applicant's residential address, which was the last address for service provided to the Tribunal, and that the applicant did not appear before the Tribunal on the scheduled hearing date. Being satisfied that the invitation met the requirements of the Act, and given the applicant's failure to contact the Tribunal, the Tribunal found that it would not use its discretion under s.362B(2) of the Act to reschedule the applicant's appearance and would make a decision on the review without taking further action to allow or enable him to appear before it.
14. The Tribunal set out the relevant law, stating that the central issue in the review was whether the applicant met the time of decision criterion in subcl.820.221 of Schedule 2 to the Migration Regulations that he continued to be the spouse of the nominator at the time of decision unless one of the specified exceptions applied. It set out that the applicant had been nominated by Ms L, an Australian citizen, but in his letter to the Tribunal of 11 November 2010 had advised that the relationship had ended and he had a new girlfriend.
15. In its findings and reasons, the Tribunal found that the relationship between the applicant and the nominating spouse had broken down. This finding was based on the applicant's letter to the Tribunal received on 11 November 2010 in which he had stated that his nominating spouse had left his home, that he had not had contact with her and that he was in a relationship with someone else. As the applicant's relationship with his nominating spouse had broken down, the Tribunal found that he was no longer the spouse of the nominator at the time of the decision within the Act. The Tribunal also found that there was no evidence that any of the exceptions to the criterion in subcl.820.221 applied to the applicant.

16. In that context the Tribunal referred to the applicant's claim that he had had a child with his current girlfriend, but noted that this was not a child with the nominating spouse, and that in any event there was no evidence such as a birth certificate to support such claim. The Tribunal found that subcl.820.222(3), which provides an exception to the requirement of an ongoing spousal relationship with the nominator where there are orders under the Family Law Act, only related to legal obligations of both the applicant and the nominating spouse towards a child. It found that the applicant did not meet subcl.820.221(3) of the Regulations. Hence it affirmed the decision under review on the basis that the applicant did not meet a criterion for the grant of the visa.

17. The applicant sought review by application filed in this Court on 17 January 2011. He did not file an amended application or written submissions, but made oral submissions today. The application contains three grounds of review. The first is that:

The applicant lost a chance of scheduled hearing required by MRT because of delaying of postal system and not received notice of hearing on time.

18. It is not entirely clear how this claim sits with the evidence of the hearing invitation letter being returned to sender and a Tribunal case note dated 16 December 2010 recording that the applicant went to the Tribunal to inquire about his case, confirmed that his current address was that recorded on file (the Ultimo address to which the hearing invitation was sent) and that he was too late to collect the Tribunal's hearing invitation letter from the Post Office as he had been in Melbourne for a while and had not received it.

19. In any event, even if there was some delay as contended, the difficulty for the applicant is that this would not establish a jurisdictional error on the part of the Tribunal. I am satisfied that, as submitted for the first respondent, the hearing invitation complied with the applicable requirements of the Act and Regulations. It was addressed correctly to the applicant at the address nominated by him in the change of contact details form he had lodged. It advised him that the Tribunal was unable to make a favourable decision on the information before it, and invited him to appear before it to give evidence under s.360 of the Act, giving notice of the specified date, time, and place of the hearing, as

required under s.360A(1) of the Act. It contained a statement of the effect of s.362B of the Act and the options available to the Tribunal if the applicant failed to appear before it as required by s.360A. The letter was given to the applicant by one of the means specified in s.379A of the Act, being sent by pre-paid post to the last residential address provided to the Tribunal by the applicant in connection with the review. I note in that respect that an affidavit of Joseph Benedict Johnson, sworn and filed on 20 June 2011, annexes a copy of the Tribunal's "*Lodgement Receipt – Multiple lodgements*" form for 15 November 2010. I am satisfied on the basis of that evidence that the letter in question, which bears a registered post number the same as that contained on the lodgement receipt, was sent by pre-paid post to the correct address for the applicant on 15 November 2010. The period of time provided to the applicant exceeded the prescribed period in reg.4.21 of the Migration Regulations.

20. As the Tribunal correctly found, the invitation was sent pursuant to s.379A of the Act and in accordance with the requirements of the Act and regulations. Hence the applicant was taken to have received the invitation seven working days after the date of the letter under s.379C of the Act. That is so whether or not he actually received it, because the invitation complied with the applicable legislative requirements for a valid invitation.
21. It has not been established that there was any failure by the Tribunal to comply with its obligations under the Act in relation to the invitation to the hearing, see *SZOBI v Minister for Immigration and Citizenship (No.2)* (2010) 119 ALD 233; [2010] FCAFC 151.
22. I also note for the sake of completeness that the Tribunal considered the applicant's claims based on his submission of 11 November 2010, not simply on the basis on his non-appearance at the Tribunal hearing. It made its decision on the basis of his written evidence that the relationship between himself and his nominating spouse had broken down. There is nothing before the Court to indicate any jurisdictional error in the Tribunal proceeding in this way.
23. Ground two is that the applicant "*has other evidence regarding his child with his current girlfriend*". It is associated with ground three which is that his current girlfriend and their child:

...all need applicant's care. The girlfriend has been injured because of car accident, unable to take care of herself long. The applicant has responsibility to her because of his car. The applicant has responsibility to take care of his current family.

24. However, these assertions about the applicant's current relationship status with someone other than his nominator appear to misconceive the nature of judicial review proceedings. First, insofar as he seeks merits review of the Tribunal decision, merits review is not available in this Court. These submissions do not establish any arguable case of jurisdictional error in the Tribunal decision, as they relate only to the applicant's relationship with a person other than the nominating spouse.
25. Insofar as the applicant may be seeking to raise humanitarian concerns with the Court, the Court has no discretion on humanitarian grounds to remit a matter to the Tribunal. Such matters may be matters the applicant can raise with the Minister, but they are not matters that establish jurisdictional error on the part of the Tribunal. As no jurisdictional error has been established in relation to the Tribunal decision, the application must be dismissed.
26. The applicant has been unsuccessful and the first respondent seeks costs in the sum of \$3,500. The amount is considerably less than that provided for in the Federal Magistrates Court Rules. It is appropriate in light of the nature of this and other similar matters.
27. The applicant told the Court that he did not have much income at the moment. However, his lack of funds is not a reason for departing from the normal principle that an unsuccessful applicant should meet the costs of the first respondent, although it may be a matter to be taken into account by the Minister in determining when and how to seek to recover such costs.

I certify that the preceding twenty-seven (27) paragraphs are a true copy of the reasons for judgment of Barnes FM

Date: 8 July 2011